United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

No. 74-2370

IN THE UNITED STATES

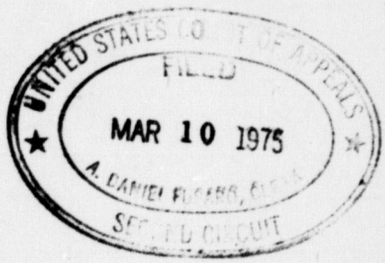
COURT OF APPEALS FOR THE SECOND CIRCUIT

B
P/S

GERARD and GEMMA BRAULT
(Plaintiffs-Appellants-Respondants)

v.

TOWN OF MILTON
(Defendant-Appellee-Petitioner)



ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF VERMONT

PETITION FOR REHEARING IN BANC

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UNITED STATES COURT OF APPEALS

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GERARD AND GEMMA BRAULT	No. 74-2370
v.	
TOWN OF MILTON	

PETITION FOR REHEARING IN BANC

The TOWN OF MILTON, defendant-petitioner herein, respectfully petitions this Court for a rehearing in banc of its decision of February 24, 1975, in the above-entitled case.

In an opinion by Judge Smith, joined in by Judge Oakes, the Court held that a municipality may be sued for deprivations of rights secured by the Fourteenth Amendment despite its exclusion from 42 U.S.C. §1983, the cause of action arising directly from the Constitution.

Judge Timbers dissented on the basis that such a result runs contrary to the Supreme Court's decision in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

I. STATEMENT OF CASE

This litigation stems from the promulgation and enforcement of a zoning ordinance by the Town of Milton, Vermont. In proceedings in which the Braults were represented at all stages, the Town secured a preliminary and subsequently permanent injunction prohibiting the establishment of a trailer park in violation of the ordinance. The ordinance was eventually judged to have been improperly enacted and the injunction was thereupon vacated by the Vermont Supreme Court. Town of Milton v. Brault, 129 Vt. 431, 282 A.2d 681 (1971). Damages were sought on the basis of a wrongfully issued injunction, but were eventually denied by the Vermont Supreme Court on the basis of the sovereign immunity enjoyed by the Town. Town of Milton v. Brault, 132 Vt. 377, 320 A.2d 630 (1974).

The Braults then took their claim to the federal district court and sought damages for having been denied use and enjoyment of property without due process of law. Judge Coffrin dismissed the complaint on the ground that the Town was not a "person" wthin the meaning of 42 U.S.C. §1983.

On appeal to this Court, a divided panel held the Fourteenth Amendment to provide a cause of action upon which relief may be granted, and jurisdiction to be properly based upon 28 U.S.C. §1331. The majority's holding was based upon a reading of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), which found therein a "sweeping approbation of constitutionally-based causes of action." Judge Timbers "emphatically" dissented.

II. IN BANC RECONSIDERATION IS NECESSARY TO SECURE UNIFORMITY OF DECISIONS WITHIN THE SECOND CIRCUIT

The holding that a municipality may be sued solely on the basis of the Fourteenth Amendment, even though it is immune from suit under the major enforcing legislation enacted pursuant to that Amendment (§1983), is directly contrary to the holding of a panel of this Circuit in Fisher v. City of New York, 312 F.2d 890, cert. denied, 374 U.S. 828 (1963). The Court in Fisher held as follows:

> "Insofar as plaintiff's claim is based, not on the Civil Rights Act, but directly upon section 1 of the Fourteenth Amendment to the United States Constitution, we affirm on the ground that plaintiff has not stated a claim upon which relief can be granted." At 891.

The decision in this case also throws into doubt, the holding of this Circuit in Gonzalez v. Doe, 476 F.2d 680 (1973), that, without specific authority in the language of the constitution, federal liability can be created only by an affirmative act of Congress. Id., at 685. Gonzalez similarly faced the question of municipal liability for deprivations of rights secured under the Fourteenth Amendment.

Read together, Fisher, Gonzalez and Brault cannot be considered to provide uniformity of decision within the Circuit. See also, Perzanowski v. Salvio, 369 F.Supp 223, 229-230 (D. Conn., 1974); Johnson v. New York State Education Department, 319 F. Supp. 271, 276 (E.D.N.Y. 1970).

III. THIS PROCEEDING INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE.

The federal liability of municipalities for past depriviations of constitutionally secured rights is a subject of surpassing importance to both the municipalities themselves and the federal courts. An obvious gauge of this importance is the number of cases that have reached the Supreme Court on this subject in recent years. See, e.g., Monroe v. Pape, 365 U.S. 167 (1961); Moor v. County of Alameda, 411 U.S. 693 (1973); District of Columbia v. Carter, 409 U.S. 418 (1973); City of Kenosha v. Bruno, 412 U.S. 507 (1973).

Moreover, the analysis of the majority sweeps far beyond the liability of municipalities. Any public employee or agency not protected by the Eleventh Amendment now faces a damage suit if an aggrieved person can find a constitutional provision which provides him with some substantive right. Given the apparently unlimited sweep of the due process clauses, such a provision should not be difficult to find. The majority's holding most surely "opens the door for another avalanche of new federal cases." Bivens, supra, at 430 (Blackmun, J. dissenting). While such an avalanche is certainly no reason for changing the result, it does point up the exceptional importance of the question.

The negation of a line of Supreme Court and Second Circuit cases which purport to carry out Congressional intent of protecting the fisc of municipalities is exactly the kind of question of exceptional importance which should be reconsidered by the Court in banc.

IV. THE MAJORITY'S BROAD READING OF BIVENS IS ERRONEOUS.

The majority found a "sweeping approbation of constitutionally based causes of action" in Bivens. A careful reading of Justice Brennan's majority opinion in Bivens must lead to the conclusion that its holding is limited to the specific facts of that case and to the specific language of the Fourth Amendment.

Webster Bivens' grievance began when federal agents entered his apartment and took him into custody. He had no opportunity to enjoin such conduct. The mere invocation of authority deprived him of any remedy but one of redress after the fact. If his rights under the Fourth Amendment were to receive any protection, his only remedy was an award of damages. The Braults, however, were only subjected to a civil suit in state court. If the mere institution of suit served to deprive them of property without due process, a position the Town most strenuously opposes, the Braults were not denied a remedy. In addition to defending the action, they could have enjoined its prosecution if indeed violative of the Fourteenth Amendment. Lynch v. Household Finance Corp., 405 U.S. 538 (1972). Certainly such an action could have named the individual selectmen as defendants and thereby obviated any of the procedural problems which have beset the case at bar. See, Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972). The commandment of Chief Justice Marshall that every injury must have a remedy, does not imply that such a remedy must be one in damages, particularly where the

latter is contrary to the specific intent of the Congress. Indeed, William Marbury sought only a writ of mandamus. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The extraordinary need of the Bivens court to find some remedy with which to effectuate a constitutional right is not present in the case at bar.

The Bivens court found no special factors counselling hesitation in the absence of affirmative action by Congress. 403 U.S. at 396. However in the case at bar there is certainly the "special factor" of the public nature of the defendant. Although the majority was not impressed by this factor, Congress certainly was. Monroe v. Pape, supra, at 191. Whereas Bivens dealt with an area in which Congress had never legislated, Brault enters an area of specific legislation based upon extensive debate and negates the intended limitations of such legislation. The Town submits that there is an "explicit congressional declaration that persons injured [by a municipality] may not recover money damages," a situation in contradistinction to Bivens. See, Bivens, supra, at 397. The congressional decision regarding municipal liability is of particular importance in this area as the statute which reflects that decision is the principal one enforcing the Fourteenth Amendment (§1983), the provision asserted to give rise to a cause of action in Brault.

The scope of Bivens can be further brought into focus by comparing it with the concurring opinion of Justice Harlan. While the majority opinion examines the particular nature of Bivens injury and compares it to the scope and purpose of the Fourth Amendment, Justice Harlan dwelt on the broad question of the authority of a district court to grant traditional remedies with only a general jurisdictional grant

(§1331) and a constitutionally founded cause of action. Id., at 398-411. As no other members of the Court subscribed to the Harlan concurrence, it must be assumed that his admittedly broader opinion was not subscribed to by the Court.

The majority opinion in Bivens does not stand for the proposition that any constitutional guarantee provides a basis for monetary relief in federal court so long as the damages sought exceed $10,000. The majority opinion admonishes against such a broad holding, Id., at 396, 397, and the particular circumstances of this case warrant obediance to such a warning. It is submitted that the Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Amendment by appropriate legislation precisely because of the sensitivity surrounding the imposition of federal authority upon branches of state or local government. The Congress has exercised such enforcement powers, but not to the extent desired by plaintiffs. This situation is precisely one counselling hesitation in the absence of affirmative and the presence of negative action by Congress.

V. THE FEDERAL COURTS HAVE NO JURISDICTION TO REMEDY DEPRIVATIONS OF CONSTITUTIONAL RIGHTS THROUGH STATE ACTION EXCEPT AS PROVIDED FOR BY 28 U.S.C. §1343 (3).

Plaintiffs herein and the majority opinion assume that jurisdiction is properly founded upon 28 U.S.C. §1331 because the complaint alleges damages exceeding $10,000. Implicit in the majority's holding are the following propositions: 1) 28 U.S.C. §1343 has no application in cases where the amount in

dispute exceeds $10,000; and 2) 42 U.S.C. §1983 was enacted in vain. The Defendant disputes these implications as disfavored legislative interpretation, and instead asserts that the proper reading of 28 U.S.C. §1331 is that is has no application to cases seeking to redress deprivation of Constitutional rights under color of state law.

Sections 1983 and 1343 were enacted in 1871 for the express purpose of enforcing the provisions of the Fourteenth Amendment. Lynch v. Household Finance Corp., supra, at 545. The Fourteenth Amendment itself limits only "state action", Civil Rights Cases, 109 U.S. 3 (1883), and the statutes commonly known as the Civil Rights Act (1983, 1343) similarly deal only with state action. Jackson v. Metropolitan Edison Co., _____U.S.____, 43 U.S.L.W. 4110 (1974). If Section 1 of the Fourteenth Amendment is indeed self-enforcing, as apparently held by the Brault majority, then §1983 was rendered unnecessary subsequent to the passage of §1331. The jurisdiction derived from the latter and the cause of action arose not from §1983 but directly from the Constitution. For claims under $10,000 §1983 is similarly unnecessary, and was so from its very enactment. Section 1343 (3) and the Amendment itself provide all that is needed.

In 1875, four years after enacting §§1983 and 1343, Congress granted the federal courts jurisdiction of "suits of a civil nature at common law or in equity ... arising under the Constition or laws of the United States." 18 Stat. 470, 28 U.S.C. §1331. Section 1331 contains no requirement of state action but does require a minimum jurisdictional amount, now $10,000.

However, the same Congress which passed §1331 also amended §1983 so as to enlarge its scope. Hence any reading of §1331 which would render §1983 unnecessary and vain would not only be contrary to general rules of statutory interpretation, but would also ignore the facts of history. See Lynch, supra at 548. If the federal courts have broad authority to provide remedies directly from the Constitution so long as the ad damnun exceeds $10,000, then what is the purpose of §1983?

The Brault majority apparently reconciles the three sections (1331, 1343, 1983) to infer a legislative intent to protect municipalities from litigation under the $10,000 level, while exposing them to claims exceeding that level. Such a reading is certainly at odds with more usual waivers of soverign immunity which provide remuneration for claims up to a given amount (often the limits of liability insurance) but not beyond. Certainly some such waivers of immunity do not have upper limits, but none can be found that have only lower limits. Congress' fear of public treasuries being depleted seems to have become a reality; this despite its best efforts to avert such a situation.

The Town urges a quite different reconciliation of these three statutes, one which does not repeal §1983 by implication, and does not pare down the scope of §1343 (3) solely to suits under $10,000. Rather, the Town urges the statutes to be read in pari materia with the specific constituting an exception to the general. It is no longer disputed that, despite its broad wording, §1983 does not create liability against municipalities. City of Kenosha v. Bruno, supra.

Further, despite the different wording of the substantive and jurisdictional provisions of the 1871 Act, when the §1983 claim alleges constitutional violations §1343(3) provides jurisdiction and both sections are construed identically. Douglas v. City of Jeannette, 319 U.S. 157, 161 (1943); Lynch, supra n.7. Hence if municipalities are excluded from the substantive coverage of §1983, they are thereby excluded from the jurisdictional coverage of §1343(3). The latter is the specific statute dealing with jurisdiction of the district courts in cases to redress deprivations under color of state law of rights secured by the Constitution. Certainly the case at bar is one seeking redress of such a deprivation. Appendix, 2-3. If the specific statute dealing with the claim here advanced deprives the district court of jurisdiction, which §1343(3) certainly does, did Congress in enacting a far more general jurisdictional grant intend to abrogate this important exclusion? General statutory interpretation would suggest not; historical analysis of Congressional debate affirms that to not have been the case. See, Lynch, supra n.14. It is therefor respectfully suggested by the Town that §1331 does not abrogate the limitation on jurisdiction over municipalities which is a part of §1343(3) and that § 1331 does not afford jurisdiction over claims stating deprivations under color of state law. Rather, it is the purpose of §1331 to afford jurisdiction in important cases, those over $10,000, for which Congress has not specifically afforded or denied jurisdiction.

This view of the relationship of §§1331, 1343(3), and 1983 is not at odds with the holding in City of Kenosha. There Justice Rehnquist carefully notes that the Court had neither

the benefit of briefs, arguments, nor explicit consideration by the District Court of what he terms a "jurisdictional question." Id., at 514. Finally, it is also in accord with the congressional intent to exclude all municipalities--regardless of whether or not their immunity has been lifted by state law--from the civil liability created in the Act of April 20, 1871, §§1343(3) and 1983. Moor v. County of Alameda, supra at 710. It belies the consistency normally accorded legislation to hold that Congress intended to repeal by implication the important limitations on civil rights actions it so carefully insured in 1871, and that it did so a mere four years later with apparently no debate. Instead, the Town urges the Court to reconsider its holding and dismiss the claim for lack of jurisdiction under either §§1331 or 1343(3).

CONCLUSION

For all of the reaons set forth above and in our papers previously submitted and on file with this Court the Town of Milton urges that its petition be granted and the decision appealed from should be reviewed by this Court sitting in banc.

Respectfully submitted, 9 March, 1975.

TOWN OF MILTON

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CERTIFICATE OF SERVICE

I, Matthew I. Katz, a member of the firm of Latham, Eastman, Schweyer & Tetzlaff hereby certify that I have served a copy of the foregoing instrument by mailing the same, first-class mail, postage prepaid to John A. Burgess, Esquire, Box 766, Montpelier, Vermont 05602 this 9th day of March, 1975.

Matthew I. Katz